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Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973

When Richard Nixon signed the Rehabilitation Act of 1973 into law, he declared that it would help "hundreds of thousands of our disabled citizens attain self-sufficiency." Ever since he spoke, controversy has brewed over how the original Act's next-to-last provision, section 503, should contribute to that endeavor. Section 503(a) commands that certain contracts between the federal government and private contractors contain a provision requiring the contractor to take "affirmative action to employ and advance in employment qualified handicapped individuals." Section 503(b) permits such individuals to initiate administrative enforcement of the contract provisions, but the Act is silent regarding direct, private judicial actions to enforce section 503(a). For several years, courts and commentators have disagreed about whether the statutory framework implies such a private right of action.

1. I9 WEEKLY COMP. OF PRES. DOC. 1197 (Sept. 26, 1973).
3. Section 706(7) defines "handicapped individuals" as follows: "'handicapped individuals' means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. § 706(7) (Supp. II 1978).
5. This Note uses the phrase "private right of action" to describe a private plaintiff's right to sue to enforce the employer's duties not to discriminate and to take affirmative action to assist handicapped individuals. Such a suit would seek appropriate legal and equitable relief, including reinstatement and back pay. For a discussion of the exhaustion of remedies requirement precedent to this right, see notes 75-77 infra and accompanying text. The Department of Labor has obtained back pay and reinstatement as part of conciliation agreements. See note 66 infra.

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A recent amendment to the Rehabilitation Act has fueled the debate. In 1978, Congress added section 505, \footnote{6} which permits courts to award attorney's fees to successful litigants under title V of the Act. Title V includes section 503. Reasoning that this amendment and its accompanying legislative history evince congressional approval of a section 503 private remedy, four District Courts have permitted private suits. \footnote{7} The Fifth, Sixth, and Seventh Circuit Courts of Appeals, however, have refused to recognize a private right of action \footnote{8} on the grounds that section 505 is too ambiguous to create a section 503 private right of action and that nothing warranted the assumption that a private right of action had somehow been created before 1978. \footnote{9}

This Note urges courts to recognize a private right of action under section 503. Part I reviews all the evidence of legislative intent available today. It concludes that by now the congressional desire for a private right of action has become abundantly clear. Part II examines the more difficult issue of when that congressional desire crystallized into law. It finds ample reliable evidence that a private right of action has existed since Congress first passed section 503 in 1973.

I. THE PRIVATE RIGHT OF ACTION TODAY

The question of whether a statute embodies a private right of action for its enforcement is "basically a matter of statutory construction." \footnote{10} And where a statute is silent, the court that construes it must assess what result Congress most likely desires. \footnote{11} That task al-


In contrast to § 503, courts have generally agreed that § 504 of the Act, which prohibits discrimination against handicapped individuals by recipients of federal financial assistance, contains an implied private right of action. \textit{See} note 39 infra.

This Note does not directly discuss the Sixth Circuit's brief opinion in \textit{Hoopes}. The court reasoned that § 503 provides an exclusive administrative remedy, and, in one sentence, refused to infer a private right of action. 611 F.2d at 135. For a rebuttal of the \textit{Hoopes} argument, see notes 32-34 infra and accompanying text.
11. \textit{Cf.} United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (L. Hand, J.) ("Flinch as
ways demands judgment and choice,\(^\text{12}\) and jurists seek guidance from many sources.\(^\text{13}\)

During the past decade, the Supreme Court has struggled several times with the question of what sources of guidance are most appropriate in determining whether a statute implies a private right of action. In *Cort v. Ash*,\(^\text{14}\) the Court articulated four "factors" to be weighed: (1) whether Congress enacted the statute for the especial benefit of the plaintiff's class, (2) whether the legislative history supports or opposes a private remedy, (3) whether a private right of action is consistent with the statute's underlying purposes, and (4) whether a federal right of action would impinge on an area of law traditionally occupied by the states.\(^\text{15}\) The list of factors is somewhat confusing, since it combines one source of guidance\(^\text{16}\) with three policy concerns that may rationally be imputed to Congress.\(^\text{17}\) Nonetheless, the list conveys two clear messages:

(A) In searching for a private remedy, the Court will be guided by the statutory language read in the light of both the legislative history and its own assessment of rational social policy; and

(B) In assessing rational social policy, the Court will give special emphasis to three concerns: (i) proportionality between rights and remedies, (ii) efficiency, and (iii) federalism.

In the years since *Cort*, the Supreme Court has refined the man-
ner in which Cort is applied, asserting that the four factors are not "entitled to equal weight." The Court has refused to infer a private cause of action solely on the strength of its own judgments about rational social policy. Unwilling to create broad "judicial legislation" in this area, an emerging majority of the Court has come to demand a fairly clear signal that Congress contemplated a private right of action.

This Part evaluates the issue of a private right of action under section 503 in a manner that should prove acceptable to all the Justices on the Supreme Court. It hews to the text and history of the Rehabilitation Act, allowing the Cort policy concerns to play a subordinate but supporting role. Each of these traditional sources

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19. This term need not suggest a judicial process that differs in kind from statutory interpretation. "Statutory interpretation shades into judicial lawmaking on a spectrum." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (2d ed. 1973). Instead, the term "judicial legislation" suggests a difference in degree that corresponds to a shift in primary policymaking responsibility from legislators to judges. Such a shift may arouse some concern that voters will not be able to hold their democratically elected legislators to account for the broad government policies that regulate society.

In the context of implied private rights of action, this concern first appeared in the opinions in Cannon v. University of Chicago, 441 U.S. 677 (1979). In his Cannon dissent, Justice Powell argued that the Cort test usurps legislative power in violation of the separation of powers doctrine. 441 U.S. at 730-49. Although Justice Rehnquist did not follow Justice Powell's recommendation that Cort be discarded, his concurring opinion expressed a similar criticism. According to Justice Rehnquist, Congress, relying on judicial decisions, had come to expect "the courts to decide whether there should be a private right of action, rather than determining this question for itself." 441 U.S. at 718. Responding to these fears, Transamerica and Touche Ross emphasize that congressional intent, not the "desirability of implying private rights of action" is primary. 444 U.S. at 15. See 442 U.S. at 568. See also Rivers v. Rosenthal & Co., 634 F.2d 774, 781 n.11 (5th Cir. 1980).


22. This Note will not discuss the last of the Cort policy concerns (federalism) in the text; rather it follows the footnote approach of the courts of appeals. See Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1238 n.23 (7th Cir. 1980); Rogers v. Frito-Lay Inc., 611 F.2d 1074, 1078 n.4 (5th Cir.), cert. denied, 101 S. Ct. 246 (1980). Section 503 is an antidiscrimination provision. In Cannon v. University of Chicago, 441 U.S. 677, 708 (1979), the Supreme Court declared that federalism concerns do not preclude a private right of action to enforce "a prohibition against invidious discrimination of any sort." The Court noted that since the enactment of the Civil War Amendments, "the Federal Government and the federal courts have been the "primary and powerful reliances" in protecting citizens against... discrimination." 441 U.S. at 708. The Simpson court cited another consideration supporting the same conclusion. With regard to § 503, the court stated: "Federal interest is even more obvious where, as here, the factor that triggers application of the statute is the existence of a contractual relationship be-
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of insight into the legislative mind points toward the conclusion that Congress has created a private right of action to enforce section 503.

A. Textual Support for a Private Right of Action

Analysis must begin with the text of the statute. Three sections of the Rehabilitation Act — two enacted in 1973 and one in 1978 — demark the boundaries within which a private right of action may be found.

The first section, 503(a),23 issues the commands that a plaintiff would like to enforce. It requires that “[a]ny contract [of given size and subject matter] shall contain a provision requiring that . . . the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .”

On one level, section 503(a) appears to be a single command: the contracts must contain the requisite provision. One might be tempted to say that the statute does no more, that Congress required contractors to make a promise but did not care whether they keep it. Indeed, two circuit courts seem to have adopted a variant of that interpretation.24

Yet such a view seems excessively crabbed. It suggests that Congress cared more about the phrases in contracts than about the behavioral consequences that follow. Surely the more natural reading is that in enacting section 503(a) Congress wanted to ensure that handicapped individuals share in the benefits of government con-

23. 29 U.S.C. § 793(a) (Supp. II 1978). The full text provides:
(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.


The Rogers court adopted an even less defensible construction than that given in the text. It held, “The duty [that § 503(a)] directly creates is imposed upon federal departments and agencies, not upon contractors.” 611 F.2d at 1079. The court was apparently trying to classify § 503(a) among what the Supreme Court had called “simple directives” — statutes primarily directed to agencies as “a prohibition against the disbursement of public funds to . . . institutions engaged in discriminatory practices.” Cannon v. University of Chicago, 441 U.S. 677, 691-92, 693 n.14 (1979) (footnote omitted). But even if one adopted the literalist view that § 503(a) only creates a duty regarding the form of the contract, nothing supports the assertion that the duty is imposed upon the government alone, rather than on the contractor or on both parties jointly. The statute says that the “contract . . . shall contain” the provision, not “the Department of Labor shall not make contracts unless . . . .”
tracts. 25 In its regulations implementing section 503(a) 26 the Department of Labor adopts this interpretation, stating that the contractor's affirmative action duty arises "by operation of the Act," regardless of whether a given contract includes an affirmative action clause. 27

Thus, although section 503(a) does not explicitly give handicapped individuals a right to enforcement, the better reading supports two important conclusions. First, the provision was intended to help handicapped employees of government contractors. 28 And second, the provision gives contractors a duty to implement some affirmative action program 29 and to refrain from discrimination.

25. Such a reading seems more consistent with the overriding statutory purposes. See, e.g., 29 U.S.C. § 701(8) (1976 & Supp. II 1978) ("to promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment"). The legislative history adds further corroboration. See note 41 infra.

Such a reading is also more consistent with the assumptions underlying the common-law doctrine giving third-party beneficiaries the right to enforce some contracts. Whether an individual has such a right generally depends on the intent of the promisee. See Restatement (Second) of Contracts § 133(1)(B) (1973). In some jurisdictions, however, the right is automatic when the promisor has promised to render a performance directly to or for the third party. See, e.g., Mich. Comp. Laws § 600.1405 (1970). See generally J. Murray, Murray on Contracts § 279 (1974). If Congress was at all familiar with this body of law, it is fair to assume that Congress believed it was giving handicapped employees enforceable rights.


By operation of the Act, the affirmative action clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contracts and whether or not there is a written contract between the agency and the contractor.

27. Where a statute or agency regulations require the insertion of a contractual clause, courts have held that the duties contained in the clause exist even though the clause has not been expressly included in the contract. Like § 503, Executive Order 11,246 requires that certain government contracts contain a nondiscrimination clause (Executive Order 11,246 prohibits its discrimination based on race, sex, or national origin). The Fifth Circuit has held that Executive Order 11,246's nondiscrimination command "is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties." United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 469 (5th Cir. 1977). See M. Steinthal & Co. v. Seams, 455 F.2d 1289, 1304 (D.C. Cir. 1971) (holding that government convenience clause required by agency regulations applies even if omitted from the contract). Accord, J.W. Bateson Co. v. United States, 162 Ct. Cl. 566, 569 (1963); G.L. Christian & Assocs., 312 F.2d 418, 424 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963).


29. Section 503 leaves the development of specific affirmative action regulations to the executive branch: "The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973." 29 U.S.C. § 793(a) (Supp. II 1978). Agency regulations impose a detailed set of affirmative action obligations on contractors who hold a contract exceeding $50,000 and employ more than 50 employees. See 41 C.F.R. §§ 60-741.5, 60-741.6 (1980).
The next section, 503(b),\textsuperscript{30} sets forth a mechanism for enforcing the rights created under section 503(a). It authorizes handicapped individuals to file a complaint with the Department of Labor and requires the Department to investigate and “take such action thereon as the facts and circumstances warrant.”\textsuperscript{31} This section emits conflicting signals regarding the congressional attitude toward a private cause of action. On the one hand, it confirms that Congress intended section 503(a) to help handicapped individuals by imposing enforceable duties on government contractors. On the other hand, section 503(b) explicitly discusses an administrative remedy while keeping silent regarding a judicial remedy.

Many courts have interpreted that silence to imply disapproval, citing the maxim of statutory construction that presumes lists of remedies to be exhaustive.\textsuperscript{32} But even conceding the utility of such maxims in divining congressional intent,\textsuperscript{33} one must resist seeing them as any more than empirical estimates of likely legislative preference.\textsuperscript{34}

\textsuperscript{30} 29 U.S.C. § 793(b) (1976). The full text provides:
(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

\textsuperscript{31} Section 503(b) states that the Department of Labor “shall” investigate each complaint and “shall” take such action as the facts and circumstances warrant. In contrast, Title VI of the Civil Rights Act of 1964 gives agencies considerable enforcement discretion: “Compliance with any requirement adopted pursuant to this section may be effected . . . by . . . termination . . . or . . . other means authorized by law.” 42 U.S.C. § 2000d-1 (1976) (emphasis added). Nevertheless, the Supreme Court, in accord with the holdings of other federal courts, see Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir.), cert. denied, 388 U.S. 991 (1967); Blackshear Residents Org. v. Housing Auth., 347 F. Supp. 1138, 1146 (W.D. Tex. 1972); Hawthorne v. Kenbridge Recreation Assn., 341 F. Supp. 1382, 1383-84 (E.D. Va. 1972), has hinted that a private right of action exists under title VI. See Cannon v. University of Chicago, 441 U.S. 677, 698-701 (1979); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 418-21 (1978) (Stevens, J., concurring).


\textsuperscript{34} Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 420-21 (1975), indicates that the Court will apply the exclusio maxim where there is no extrinsic evidence of legislative intent. In other cases, the Court has employed the principle only where indications of an intent to deny a private remedy exist. See Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979) (holding that other evidence of intent . . . in this case . . . weights against the implication of a private right of action . . . ”); National R.R. Passenger Corp. v. National
The maxim must be quickly discarded when more specific evidence is unearthed. For example, the Supreme Court has supplemented an express administrative remedy with an implied judicial remedy on several occasions, most notably under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Those findings are especially relevant in the context of section 503, which was patterned after title VI and title IX. Thus, the presence of section 503(b) gives little help in deciding whether Congress supports a private right of action under section 503(a).

The third section, 505, was not a part of the original Rehabilitation Act. It was added in 1978 in order to remove a perceived obstacle to proper implementation of the Act. It provides: "In any action or proceeding to enforce a charge or violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Like the two earlier sections, section 505 is not conclusive on the issue of whether a private cause of action exists under section 503. The attorney's fee provision clearly contemplates courtroom proceedings to enforce title V ("this subchapter") involving some party other than the United States. Still, without examining the legislative history one might be tempted to conclude that Congress had other proceedings in mind than a section 503 private cause of action.

Conceivably, Congress might have been intending only to provide attorney's fees in private actions to enforce section 504. Yet if


37. See 120 CONG. REC. 30,551 (1974) (statement of Senator Stafford) ("It was the committee's intent that the enforcement under sections 503 and 504 would be similar to that carried out under section 601 of the Civil Rights Act and 901 of the Education Amendments of 1972.").


No otherwise qualified handicapped individual in the United States, as defined in § 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Courts have generally agreed that § 504 embodies a private right of action. See Hart v.
that had in fact been the legislative goal, one would have expected to find narrower language than "a provision of this subchapter." Another possibility would be that Congress intended only to provide attorney's fees for employers who successfully defended suits by the Department of Labor. Yet there again, one would have expected to find language more appropriate to such a narrow goal. A final possibility would be that Congress planned to cover both sections 503 and 504, but wanted only to cover a handicapped person's expenses in filing an administrative complaint under section 503(b). Yet that construction seems no more likely than the first two since the attorney's fees associated with an administrative complaint are virtually nil. The most plausible reading is that Congress expected section 505 to help handicapped individuals bring private rights of action under both sections 503(a) and 504.

To summarize, the language of sections 503(a), 503(b), and 505 gives credence to the notion of a private cause of action to enforce section 503(a). The statutes assist a special group of people, encourage that group to complain when the section is being violated, and suggest that the enforcement scheme will involve courts and attorneys' fees. Nonetheless, the smoking pistol is missing. No provision declares, "There shall be a private cause of action." The County of Alameda, 485 F. Supp. 66, 69 (N.D. Cal. 1979), and cases listed therein. Dispute does exist over whether private litigants may file discrimination complaints against all recipients of federal funds or only where the primary objective of the federal assistance is to provide employment. Compare Hart v. County of Alameda, 485 F. Supp. 66, with Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), cert. denied, 422 U.S. 947 (1979). For a general discussion of the § 504 case law, see Implied Rights, supra note 5, at 1246-51.

40. The complaint usually includes only the names and addresses of the complainant and the alleged violator, a description of the alleged violation, and a signed statement that the discriminatee is handicapped. See 41 C.F.R. § 60-741.26(c) (1980). An attorney's expertise should not be needed to compile such information. Once the complaint has been filed, the Office of Federal Contract Compliance Programs (OFCCP) investigates the matter, determines whether a violation has occurred, and, if so, attempts to work out an informal settlement. Agency regulations make no provision for the complainant's participation in this process. The only stage of administrative proceedings where complainants would require an attorney's assistance is during formal hearings, where the complainant may participate as a party. See 41 C.F.R. §§ 60-741.29(b), 60-30 (1980). A contractor may request a formal hearing only if an agreement has not been reached through informal means or the OFCCP proposes administrative sanctions. See 41 C.F.R. § 60-741.29(a) (1980). Such proceedings are extremely rare. During Senate hearings on the 1978 amendments, Donald Ellsburg of the OFCCP testified that while the OFCCP had found 556 instances of discrimination, only five administrative complaints had been issued. See Oversight Hearings on the Rehabilitation Act of 1973 Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 2d Sess. 275 (1978) (letter from Donald Ellsburg, Asst. Secretary of Labor for Employment Standards, to John Brademas, Chairman, Subcomm. on Select Education).

To summarize, the cost of the attorneys' services in this context is too low to have aroused congressional concern that expense was deterring administrative enforcement of § 503. See The Awarding of Attorney's Fees in Federal Courts: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st & 2d Sess. 134 (1977-1978) (statement of Deborah Kaplan, Disability Rights Center).
remainder of this Part explores the more explicit, albeit less definitive, evidence to support the requested inference.

B. Legislative History

Where statutory text does not completely resolve an issue of legislative policy, courts seek guidance from the recorded deliberations of Congress. Although legislative history is not put to a vote of both houses, it often gives insight into how a majority of the legislators would have voted if the issue had been raised formally. That insight is especially powerful where the history accompanies legislation that is in fact enacted. Unfortunately, the legislative history surrounding the passage of sections 503(a) and 503(b) in 1973 is silent regarding a private cause of action. The congressional discussion of other bills proposed since then, however, does help a court to interpret the statutory language. This Section explores that history in detail.

On several occasions since 1973, legislators introduced bills to add section 503 to Title VII of the Civil Rights Act of 1964, which explicitly provides a private right of action. Each on occasion, the proposal failed to pass. Although some courts have interpreted those failures as congressional disapproval of a section 503 private remedy, that interpretation is not warranted. It is always dangerous to draw inferences from a congressional refusal to act: While a “yes” vote implies general support for an entire bill, a “no” vote only implies dissatisfaction with one of the bill’s many components. The refusals to add section 503 to title VII are a clear case in point; the debates over the proposed amendments concerned the increased number of employers who would have been affected, not the merits.
of a private cause of action.\textsuperscript{44}  

In 1974, Congress amended the Rehabilitation Act to clarify the definition of "handicapped person."\textsuperscript{45} The report of the Senate Committee on Labor and Public Welfare concerning those amendments declared that section 504 of the Act permits "a judicial remedy through a private action."\textsuperscript{46} The report failed to mention, however, whether the committee understood section 503 to permit a similar remedy. Some statements in the report could be read to confirm such an understanding, but the better view is that those statements concerned a different issue.\textsuperscript{47}  

The most illuminating legislative history accompanied the passage of the 1978 attorney's fees amendment, section 505. Congress enacted section 505 in response to fears that that expense was dissuading handicapped employees from vindicating their rights.\textsuperscript{48} The

\textsuperscript{44} The jurisdictional limits of § 503 and title VII differ. Section 503 affects only federal contractors; title VII reaches all public and private employers of any size. The available evidence suggests that the amendments were proposed in an effort to expand § 503's jurisdictional limitations. Senator Dodd, for example, has indicated that he proposed adding § 503 to title VII not in order to permit private suits, but rather to extend coverage of § 503 to private employers. See Oversight Hearings on Rehabilitation of the Handicapped Before the Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Pt. I, at 321-22 (1976) (statement of Senator Dodd). Commentators have also cited § 503's jurisdictional limits as the strongest reason for adding § 503 to title VII. See Comment, The Rights of the Physically and Mentally Handicapped: Amendment Necessary to Guarantee Protection Through the Civil Rights Act of 1964, 12 AKRON L. REV. 147, 157 (1978) ("The chief inadequacy of the Rehabilitation Act is that it applies only to public employment or employment with federal contractors"); Note, Potluck Protections for the Handicapped Discriminatees: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability, 8 LOY. CHI. L. J. 814, 835, 844 (1977) (the jurisdictional limitations of § 503 are a "basic inadequacy" of the Act and form the strongest argument for adding § 503 to title VII).


\textsuperscript{47} Soon after it endorsed a private § 504 remedy, the Committee Report stressed that §§ 503 and 504 are intended to "be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result." Id. Viewed in isolation, the juxtaposition of these two statements suggests that the Committee contemplated a § 503 private remedy. This reading, however, becomes less plausible when the uniformity language is placed in context. The paragraph in which it appears bespeaks a concern for administrative enforcement of §§ 503 and 504, not, as in the preceding paragraph, with a private right of action. As one court realized, the report most likely meant that "the two responsible agencies were not to work at cross purposes or to duplicate each other's efforts." Anderson v. Erie L. Ry., 468 F. Supp. 934, 939 (N.D. Ohio 1979). See Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1169-70 (S.D.N.Y. 1980). The remarks of Senator Stafford, a member of the Committee that authored the Senate Report, support the Anderson court's interpretation. See 120 CONG. REC. 30,551 (1974) (remarks of Senator Stafford).

\textsuperscript{48} Senator Cranston, the author of the attorney's fees provision of the amendment and a member of the Senate Committee that considered and reported the bill, stated:

[In many, many cases arising under title V of the Rehabilitation Act of 1973, the handicapped individual has little money to hire and pay an attorney. ... The amendment adopted by the committee would help assure that handicapped individuals will be able to have access to the judicial process in order to assert their rights under title V.

Senate Report accompanying section 505\textsuperscript{49} gives irrefutable evidence that a section 503 private cause of action is one of the tools that Congress expected would be used to vindicate those rights. It proclaims, "[T]he availability of attorney's fees should assist in vindicating private rights of action in . . . [section] 503 cases . . ."\textsuperscript{50}

Furthermore, it is easy to impute the clear understanding of the Senate Committee to the entire 1978 Congress. The conference committee chose to adopt the final statutory language recommended by the Senate Report.\textsuperscript{51} And statements made during floor debates\textsuperscript{52} before passage of section 505 confirm Congress's agreement with the Senate Committee's statement.\textsuperscript{53} Thus, Judge Goldberg accurately assessed the evidence when, dissenting in Rogers v. Frito-Lay, Inc.,\textsuperscript{54} he concluded, "The attorney's fees provision of the 1978 Amendments constitutes an unimpeachable statement by Congress that it understood section 503 to include an implied private remedy . . . ."\textsuperscript{55}

While conceding the potential significance of this legislative history, the Fifth Circuit in Rogers nonetheless chose to disregard it. The court concluded that the 1978 committees had made an unwar-

\textsuperscript{49} S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978).
\textsuperscript{50} Id.
\textsuperscript{52} See 124 CONG. REC. S15,590-91 (daily ed. Sept. 20, 1978) (remarks of Senator Cranston). Senator Bayh was a member of the Committee that produced the Report on § 505.
\textsuperscript{53} Senator Bayh also spoke of the "continuing intention of Congress that private actions be allowed under . . . title V of the Rehabilitation Act of 1973." Id. at S15,593.
\textsuperscript{54} Note also that the Senate Committee Report's explicit recognition of a § 503 private action went unchallenged and uncontradicted during debate and passage of § 505. See 124 CONG. REC. S15,647-74 (daily ed. Sept. 21, 1978); 124 CONG. REC. H13,469-76 (daily ed. Oct. 14, 1978).
\textsuperscript{55} Finally, consider the statement of the Senate Committee on Labor and Human Resources after § 505 was passed:
It is, and has always been the Committee's intent that any handicapped individual aggrieved by a violation of title V has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under title V of the Rehabilitation Act of 1973, as amended, and to receive back pay and attorney's fees if successful. S. REP. No. 316, 96th Cong., 1st Sess. 12-13 (1979).

The Seventh Circuit concluded that the statements during floor debates "could be interpreted to mean that Congress had intended to create private rights of action in sections of Title V other than § 503(a)." Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1242 n.31 (7th Cir. 1980). But Senator Cranston was more explicit:
Mr. President, the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973 . . . , employment under Federal contracts . . . are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Private enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect.
124 CONG. REC. S15,590 (daily ed. Sept. 20, 1978). When placed in the context of the Senate Reports accompanying § 505 and following its enactment, see note 52 supra, the Simpson court's "alternative understanding" seems most unlikely.

\textsuperscript{54} 611 F.2d 1074 (5th Cir.), cert. denied, 101 S. Ct. 246 (1980).
\textsuperscript{55} 611 F.2d at 1097 (Goldberg, J., dissenting).
ranted assumption “that a private cause of action had somehow been created in the past.”

56 “An assumption,” the court declared, “is not a law.”

The Rogers reasoning misconceives the issue at stake in applying sections 503 and 505. The private right of action was much more than a mere “assumption” of a few legislators; it was the principal motivation for a new statute. By permitting successful litigants to recover attorney’s fees, Congress sought to encourage such suits to make them as attractive and effective as possible.58 When that legislative wish was ratified through “a positive legislative enactment,” it indeed became “a law.”60 As the Supreme Court has said: “Where congressional intent is discernible . . . we must give effect to that intent.”

C. The Private Right of Action and the Rehabilitation Act’s Purposes

In Cort v. Ash, the Supreme Court appeared willing to weigh considerations of social policy carefully before inferring a private

56. 611 F.2d at 1082. Accord, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1243 (7th Cir. 1980).
57. 611 F.2d at 1082.
58. See S. REP. No. 890, 95th Cong., 2d Sess. 19 (1978); statements of Senators Cranston and Bayh, supra note 52.
60. The assumption-law dichotomy confuses analysis because it fails to distinguish retrospective “assumptions” from prospective “assumptions.” If a congressional assumption about the past is incorrect, it can have retroactive legal effect if and only if explicit retroactive legislation would be valid. In contrast, any congressional “assumption” about the future state of the law must be given legal effect, in accord with the courts’ duty to implement legislative intent whenever possible.

Where Congress makes an assumption about past law that is simultaneously an assumption about future law, and where the assumption about past law is erroneous, a court will find an implied amendment to the past law. The doctrine of the implied amendment is usually invoked when “the terms of [a] subsequent act are so inconsistent with the provisions of [a] prior law that they cannot stand together.” 1A C. SADS, STATUTES AND STATUTORY CONSTRUCTION § 22.13 at 140 (4th ed. 1972). See id. at §§ 22.22, 23.09, 23.12 and cases cited therein. If the Rogers-Simpson view of § 503 as originally enacted is correct, then §§ 503 and 505 are clearly inconsistent. But see Part II infra, arguing that Rogers and Simpson erroneously interpreted the intent of the 1973 Congress.

Even where the earlier and later enactments do not clearly conflict, courts interpret the earlier legislation in light of the later to give effect to the subsequent enactment. See, e.g., Amchem Prods., Inc. v. GAF Corp., 594 F.2d 470, 476-81 (5th Cir. 1979) (court gave weight to subsequent legislative expressions where the original legislative history was “unevenlightening” on the “precise point in issue”); Mount Sinai Hosp., Inc. v. Weinberger, 517 F.2d 329, 341-43 (5th Cir. 1975), cert. denied, 425 U.S. 395 (1976) (court used subsequent amendments to fill a “gap” left by original legislation: “To hold [otherwise] . . . would render the amendments pointless and ineffectual”). The courts seem concerned with giving full effect to the subsequent enactment, whether or not the subsequent Congress accurately perceived the earlier Congress’s intent. See, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980) (Court used 1971 House report to construe 1936 Act where “the precise intent of the enacting Congress [was] obscure”); Mattz v. Arnett, 412 U.S. 481, 505 (1973) (court gave weight to a 1942 statute in interpreting the 1892 Congress’s intent). See also notes 78 & 82 infra.

cause of action to enforce a statute. More recent opinions have made it clear that such policy considerations will not alone justify judicial action, especially in the face of contrary statutory language or legislative history. But where — as with the Rehabilitation Act — the statutory language suggests a cause of action, and where the legislative history suggests so even more clearly, analysis of social policy remains essential.

As was mentioned above, section 503(a) was designed to enhance the opportunities of handicapped employees of government contractors. At first blush, it would appear that private judicial enforcement of section 503(a) could only promote the congressional goal. Those with the most to gain — handicapped employees — would seem best placed to detect and prove violations, while the risk of penalties might encourage contractors to comply. Nevertheless, several courts have expressed concern that a private right of action would frustrate the statutory purpose by impeding the Department of Labor's efforts to resolve complaints through informal conciliation. This Section attempts to show that such a concern is unwarranted, that in fact a private right of action, coupled with an exhaustion requirement, complements and reinforces informal efforts at conciliation.

The courts that have suggested that a private right of action would stifle efforts at conciliation assume that the Department of Labor's activities under section 503(b) place sufficient pressures on employers that they turn conciliatory. Sadly, that is not the case. The Department's ever-increasing backlog of unprocessed cases seriously impairs effective enforcement of section 503. In 1978 the Depart-

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62. See notes 14-17 supra and accompanying text.
63. See notes 18-21 supra and accompanying text.
64. See notes 25 & 41 supra.
66. Some district courts have contended that, apart from the Department's swelling backlog, the administrative remedies provided in § 503(b) are inadequate to protect the handicapped from discrimination and to promote job opportunities for them. See Chaplin v. Consolidated Edison Co., 482 F. Supp. 1165, 1171-72 (S.D.N.Y. 1980); Hart v. County of Alameda, 485 F. Supp. 66, 75 (N.D. Cal. 1979). Although those contentions have some merit, they are seriously overstated.

Administrative regulations permit the Department of Labor to punish violations by withholding progress payments, terminating the contract, or debarring the contractor from future contracts. See 41 C.F.R. § 60-741.28 (1980). Such sanctions, however, are quite severe; absent widespread or gross violations, the Department is reluctant to impose them. See Morgan, Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process, 1974 Wis. L. Rev. 301, 333-37 (discussing the extremity of such remedies from the points of view of both federal contractors and federal agencies). In fact, as of 1978,
ment had a backlog of 1270 cases and by the end of the first three quarters of 1979, the number had jumped to 2136. Consequently, the Department takes the position that "a private right of action would be consistent with Congress's intent, and would greatly assist the Department of Labor's effort to enforce section 503." The Supreme Court, in *Cannon v. University of Chicago*, gave great weight to similar agency representations. Citing the agency's admission that it lacked adequate enforcement resources, the Court stated that the agency's position that private suits would make enforcement more effective was "unquestionably correct." A private section 503 remedy would decrease the Department of Labor's backlog of cases and provide more efficient enforcement of the statute's commands.

Even if the Department of Labor had no backlog, there is no reason to believe that a private right of action would undermine the Department's efforts to resolve disputes informally. The prospect of litigation can have a sobering effect on both employers and employees, encouraging them to resolve their differences with the help of an administrative mediator. Congress has recognized this truth in other contexts and the Department of Labor has endorsed it with regard to any type of exhaustion requirements. See notes 75-77 infra and accompanying text.

Title VI of the Civil Rights Act of 1964 is also illustrative. Title VI directs federal agencies to employ persuasion before imposing more formal sanctions yet, as the Court suggested in *Cannon*, Congress intended that title VI create an implied right of action. See 441 U.S. at 694-703.
to section 503.\textsuperscript{73}

A court should not resist the Government's conclusion that a private right of action would bolster efforts at conciliation.\textsuperscript{74} Moreover, a concerned court can guarantee that the Department of Labor retains a vital role in enforcing section 503 by fashioning a requirement that administrative remedies be exhausted before litigation.\textsuperscript{75} The approach that seems to strike the best balance between fostering agency conciliation and ensuring an effective private right of action is an exhaustion scheme patterned after the one used under title VII.\textsuperscript{76} Under such a system, courts would require exhaustion except in two situations. First, the Department of Labor could waive the requirement whenever it chose. This exception would permit the Department to relieve its backlog, protect its opportunity to conciliate, and devote its resources to the uses it deems most productive. Second, a court could waive the requirement if the plaintiff shows that the Department has not taken timely action. This exception, which courts have allowed in other areas,\textsuperscript{77} would ensure that a plaintiff's claim is heard and decided promptly.

Thus, a proper construction of the Rehabilitation Act, as amended, must include a private right of action to enforce section 503(a), together with an appropriate exhaustion requirement. That is the only construction fully consonant with the Act's language, history, and undisputed purposes.

II. WHEN DID CONGRESS CREATE THE PRIVATE CAUSE OF ACTION?

Part I demonstrated that a court studying section 503 of the Rehabilitation Act in 1981 should conclude that handicapped employees now have a private right of action to enforce that section. The

\textsuperscript{73} See Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1108 app. (5th Cir.), cert. denied, 101 S. Ct. 246 (1980).

\textsuperscript{74} Cf. Cannon v. University of Chicago, 441 U.S. at 706 n.41 (in response to the argument that a private right of action would interfere with agency conciliation, "[t]he simple answer . . . is that the Government itself perceives no such interference").

\textsuperscript{75} Proponents of a § 503 private remedy have generally recognized an exhaustion requirement, see, e.g., Hart v. County of Alameda, 485 F. Supp. 66, 71 n.7, 76 (N.D. Cal. 1980), but appear willing to create an exception where the Department has delayed processing the plaintiff's complaint. See California Paralyzed Veterans Assn. v. FCC, 496 F. Supp. 125, 131-32 (C.D. Cal. 1980) (exhaustion held inappropriate because Department's investigation lasted over one year); Hart v. County of Alameda, 485 F. Supp. at 71 n.7 (plaintiff held to satisfy exhaustion requirement because he had obtained an initial agency determination and experienced considerable delay on appeal to the agency director).

\textsuperscript{76} See 42 U.S.C. § 2000e-5(f)(1) (1976). Thirty days after taking jurisdiction over a title VII complaint, the Equal Employment Opportunity Commission may allow the complainant to institute a private judicial action by issuing a right to sue letter. After the Commission has had jurisdiction over a complaint for 180 days, the Commission can no longer require that a complainant pursue administrative remedies; the complainant has a right to litigate his claim in federal court.

\textsuperscript{77} See, e.g., Walker v. Southern Ry., 385 U.S. 196, 198 (1966). See also note 75 supra.
remainder of this Note discusses a problem whose significance will fade over time, but that presently concerns a large class of potential plaintiffs: When did Congress create the cause of action, 1978 or 1973? A quick reading of Part I may have led one to conclude that Congress did not create the cause of action until it enacted the attorney’s fees provision, section 505, in 1978. A more methodical study, however, will reveal that the insights which compel a court to find a private right of action in 1978 are equally compelling evidence of the 1973 Congress’s intent.

One should begin by asking which of the factors weighed in Part I are less potent when the inquiry is focused on the year 1973. The language of section 503 was the same in 1973 as in 1978. The concern for handicapped employees as a “special class of beneficiaries” was the same. And so was the interest in effective informal conciliation. The only troubling difference is that a court sitting in 1973 lacked the attorney’s fees amendment and its accompanying legislative history.

And yet, the 1978 legislative history embodied two judgments: (1) what the 1978 Congress desired for the future, and (2) what it believed the intent of an earlier Congress had been in 1973. Thus, that history is relevant to a modern analysis of the state of the law since 1973. Indeed, both precedent and logic suggest that the newer legislative history should be accorded great weight in determining the 1973 Congress’s intent.

The cases divide over whether a subsequent Congress’s interpretation of a statute enacted by another Congress deserves weight. Some have refused to rely on such evidence, fearing that the mem-

78. See notes 48-54 supra and accompanying text.

Someone hostile to a private right of action under § 503 might concede that Congress created a private remedy in 1978 but reject the second assertion in the text. Such a cynic might argue that the 1978 Congress was not really shedding light on earlier congressional intent but was rather trying covertly to create a retroactive remedy. The cynic might then argue that such retroactive legislation would violate the fifth amendment’s due process clause.

This Note does not attribute such skulduggery to the 1978 Congress, preferring to take the legislators at their word. Nevertheless, it bears remarking that retroactive creation of a private right to enforce § 503 would not violate the fifth amendment. The retroactive right of action would expose employers to no greater liabilities than they face under § 503(b). See note 66 supra. And even if new, more extensive remedies were created, they could only be obtained from an employer who violated a duty that was clear since 1973. The Supreme Court has upheld far more sweeping retroactive creations of liability. See Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 20-27 (1976) (upholding the Black Lung Benefits Act of 1972, which required employers to pay benefits to miners who had left employment before the Act’s effective date).

bers of the later Congress have not expressed the understanding of an earlier congressional majority. The views of a much later Congress may be uninformed. The 1970 Congress, for example, was no better situated than a court to know the unstated intent of the 1940 Congress. Similarly, even though close in time to the enacting Congress, members of the subsequent Congress may hold views that differ from those of an earlier majority. Where there is doubt that the opinions voiced by a few Congressmen commanded majority support in the later Congress, it is also unlikely that the earlier Congress would have embraced those views. Other cases have not been determined by such concerns, and courts have relied upon a subsequent Congress's declarations. For example, in Cannon v.

80. See, e.g., United States v. Wise, 370 U.S. 405, 411 (1962) (views of 1914 Congress not relevant to interpretation of 1890 Act); Heilman v. Bell, 583 F.2d 373, 377 (7th Cir. 1978) (no weight accorded to views of 1971 congressman regarding 1909 act); Massachusetts Medical Soc'y v. United States, 514 F.2d 153, 153-54 n.1 (1st Cir. 1975) ("The opinion of the 1969 Congress . . . as to the validity of the regulations as an interpretation of the statute enacted by another Congress in 1950 is entitled to little or no weight.").

81. See, e.g., CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 117-19 (1980) (Court refused to rely on, inter alia, a post-enactment statement of a legislator who had not sponsored original bill, but instead had authored a bill "less restrictive" than the original); International Bhd. of Teamsters v. United States, 431 U.S. 324, 354 n.39 (1977) (comments by subsequent Congressmen regarding the earlier act did not form the basis of the subsequent legislation); United States v. Price, 361 U.S. 304, 311-12 n.7 (1960) (Court declined to draw inferences from later Congress's failure to enact a proposed amendment); Rivers v. Rosenthal & Co., 634 F.2d 774, 790 (5th Cir. 1980) (court attributed no significance to 1975 assumptions of two legislators regarding 1974 act where "[t]here was no indication . . . that this assumption was shared by the remainder of Congress"); United States v. Mauro, 544 F.2d 588, 594 (2d Cir. 1976) (in interpreting earlier legislation court refused to rely on statements regarding a then unpassed bill). Even though subsequent expressions may not accurately capture the earlier Congress's intent, courts may rely on them if they form the basis of an enactment of the subsequent Congress. Here the court is primarily concerned with implementing the design of the later statute rather than interpreting the earlier Congress's intent.

82. When interpreting earlier statutes, courts have given weight to statements about the earlier statute on which the later Congress has relied when passing legislation of its own. In this situation, the court has assurance that the interpretation of the earlier statute was held by a majority of the later Congress. See CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980). Especially where many of the same members are present in both Congresses, it is likely that the later Congress's interpretation reflects the understanding of the earlier Congress. See Cannon v. University of Chicago, 441 U.S. 677, 686-87 n.7 (1979) ("[W]e would be remiss if we ignored these authoritative expressions . . ."); Amchem Prods., Inc. v. GAF Corp., 594 F.2d 470 (5th Cir. 1979) (Congress enacted amendment clarifying ambiguity in earlier act); Pierce & Stevens Chem. Corp. v. CPSC, 585 F.2d 1382, 1387 n.23 (2d Cir. 1978) (legislative statements are entitled to weight where they are made in the context of amending a statute by members of Congress who were involved in the development of the original legislation); Sioux Valley Empire Elec. Assn., Inc. v. Butz, 504 F.2d 168, 173, 176-77 (8th Cir. 1974) (court used legislative history of 1973 amendment to construe 1972 act).

Where the view of the subsequent Congress regarding earlier legislation forms the basis of a subsequent enactment, courts give effect to that view regardless of the danger that the subsequent Congress did not accurately perceive the earlier Congress's intent. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969) (Court gave effect to 1959 amendment declaring meaning of term in 1927 act); United States v. General Motors Corp., 518 F.2d 420, 436 (D.C. Cir. 1975) (court relied on 1974 amendments to clarify definition of term in 1966 legislation). For a discussion of this practice, see note 60 supra.
University of Chicago\textsuperscript{83} the Supreme Court held that Title IX of the Education Amendments of 1972\textsuperscript{84} includes a private right of action. As part of its reasoning, the Court examined an attorney's fees provision added by Congress in 1975.\textsuperscript{85} The Court noted that the language and the legislative history of the later provision indicated that many members of Congress had assumed that title IX authorized private suits and had believed that private enforcement was consistent with and necessary to enforcement of title IX. While the Court did not accord these views "the weight of contemporary legislative history," the Court did state: "[W]e would be remiss if we ignored these authoritative expressions concerning the scope and purposes of title IX . . . ."\textsuperscript{86}

The concerns that typically cause courts to disregard a later Congress's views as evidence of an earlier Congress's intent do not apply in the case of section 505.\textsuperscript{87} There is ample evidence that the 1973 Congress would have endorsed the 1978 Congress's conclusion that section 503 creates a private right of action. First, the drafters of section 505 were indeed better placed than a court to know the intent of the 1973 Congress. Ten of the seventeen members of the Senate Committee that drafted and twice approved section 503's language\textsuperscript{88} also served on the 1978 Senate Committee that reported that section 505 applies to private section 503 suits.\textsuperscript{89} Senators Stafford and Cranston, who preached the necessity of private rights of action under title V during the floor debates on section 505,\textsuperscript{90} had both served on the 1972 and 1973 Committees. No judge could be so intimately aware of the original understanding of section 503.

\textsuperscript{83} 441 U.S. 677 (1979).
\textsuperscript{84} 20 U.S.C. §§ 1681-1686 (1976).
\textsuperscript{86} 441 U.S. at 687 n.7.
\textsuperscript{87} Conceivably, a court also might resist using a later Congress's understanding to interpret an earlier Congress's intent out of fear that the legislature was speaking to escape accountability to the voters. Thus, the earlier Congress could avoid explicitly validating a politically sensitive interpretation of its statute; and the later congress could validate that interpretation while insisting that it was bound to the earlier Congress's intent.

Whatever the force of such an argument in other contexts, it has none in the case of § 503. The later Congress was clearly accepting full political responsibility for the continuation of the private right of action, since it strengthened that right with § 505. \textit{See} note 19 supra.


\textsuperscript{89} \textit{See} 124 CONG. REC. app. (daily ed. Sept. 20, 1978) (listing members of the Human Resources Committee).
\textsuperscript{90} \textit{See} note 52 supra.

The evidence thus belies the Rogers court's assertion that section 505 is "the product of members of a Congress so distant in time from the enacting Congress that we cannot accept their remarks as an accurate expression of the earlier Congress's intent." Section 505 is not mere "commentary"; rather, it represents a reliable clarification of the 1973 Congress's intent to create a private section 503 remedy.

CONCLUSION

As it stands today, the Rehabilitation Act of 1973, understood through its text, legislative history, and purposes, authorizes private suits to vindicate rights under section 503. Courts should effectuate legislative intent by recognizing, at least, a section 503 private right of action from the effective date of section 505. Due to administrative delays, however, suits will continue to be decided for a number of years under section 503 as it stood prior to the 1978 Amendments. Courts must therefore decide whether section 503, as originally enacted, authorizes private suits. The language of the statute and the best available evidence of the 1973 Congress's intent both support a private right of action under section 503. The judiciary should construe the Act accordingly.


93. Senator Proxmire voted in favor of the 1973 Act, but opposed the 1978 Amendments. There is no evidence, however, that Senator Proxmire voted against the Amendments because they were predicated on the understanding that a § 503 private right of action exists.


95. 611 F.2d at 1082.